IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

Vijay Kumar Sharma Vs. Smt. Ramkhushi & anr.

S.B. CIVIL FIRST APPEAL No.25/1988 against the judgment & decree dated 23.11.1987 passed by Shri Gulam Hussain, ADJ No.1, Bharatpur in Civil Suit No.26/86 (156/83)

Date of Judgment :: August 30, 2006

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Rajiv Surana for Mr. S.R. Surana for the appellant.

Mr. G.K. Garg)
Smt. Sangeeta Sharma) for the respondents

BY THE COURT:

1. Vijay Kumar Sharma, the present appellant and plaintiff before the learned trial court was adopted at the age of 12 months by one Shri Rajaram Sharma on 20.1.1962 from a Government Orphanage of Kota and a registered adoption deed was executed by the said Shri Rajaram aged 40 years on 20.1.1962 which is Ex.18 on record. The said adoption deed registered with the Sub-Registrar of Kota stated that the said Shri Rajaram and his wife Smt. Ramkhushi, defendant No.1 in the suit had no issue male or female of their own and both were desirous for a long period to adopt a son and accordingly

they were taking in adoption from Government Orphanage, the said child at the age of 12 months and the said Shri Rajaram further stipulated in the said adoption deed that his adoptive son Vijay Kumar, the present appellant shall be entitled to all the rights which would have been available to a naturally born son to him and that further customary rites etc. for such adoption he would complete in his town Bharatpur. Further that the said adoption was with full consent of his wife Smt. Ramkhushi. The said person was taken from the said orphanage and taken home to Bharatpur where he was brought up by these two adoptive father and mother for all the years upto 1974 when the things appear to have turned sour between the adoptive son and the adoptive mother.

2. Another adoption deed which also came to be described as will of the said Shri Rajaram is said to have been executed by him on 6.7.1974 which was also registered on 1.8.1974. The said document Ex.Dw.2 though mentions about adoption of Vijay Kumar, present appellant, but does not refer to the earlier adoption deed dated 20.1.1962 and in that the said Shri Rajaram who had become 50 years of age at that time again reiterated that the said Vijay Kumar will be successor of his movable and immovable property after his death. The said 'Godnama' (adoption deed) was also registered with the Sub-Registrar, Bharatpur.

3. A suit later-on came to be filed by mother Smt. Ramkhushi for declaration of the said later adoption deed dated 6.7.1974 as void and for cancellation of the same in which Shri Rajaram, father and the adoptive son Vijay Kumar were arrayed as defendants and the Civil Suit No.29/76 came to be decreed by the learned District Judge on 29.8.1979. Significantly defendant No.1 Rajaram did not file any written statement in the said civil suit and the court guardian appointed for defendant No.2 Vijay Kumar who was a minor at that time, namely Shri Ramesh Chand Bansal, advocate filed a written statement but without bringing on record the aforesaid Ex.18 adoption deed dated 20.1.1962, only stated before the court that the defendant No.1 Rajaram had brought defendant No.2 Vijay Kumar from the Government Orphanage, Kota and had executed the said adoption deed dated 6.7.1974. The court, however, found that the said adoption deed dated 6.7.1974 was contrary to Section 5 of the Hindu Adoption and Maintenance Act, 1956 and, therefore, the same was cancelled.

4. Upon becoming major the son Vijay Kumar plaintiff filed the suit which is subject-matter of present appeal namely Civil Suit No.26/86 (earlier No.156/83) for setting aside the decree and judgment dated 29.8.1979 by which the Civil Suit No.29/76 filed by Smt. Ramkhushi was

decreed on the ground that there was already a validly registered adoption deed dated 20.1.1962 in his favour and he was the only adoptive son of Rajaram and, therefore, the subsequent execution of alleged adoption deed which was nothing more than a will of the said person Shri Rajaram in favour of the said adoptive son Vijay Kumar only could not have been cancelled at the instance of plaintiff mother Smt. Ramkhushi and irrespective of its cancellation his adoption by the said Shri Rajaram under the registered adoption deed dated 20.1.1962 was not affected and the property after the death of his adoptive father Rajaram devolved upon him.

5. During the pendency of the present appeal it appears that both the adoptive father and mother Rajaram and Smt. Ramkhushi have since expired though the date of death of both these persons has not come on record from either side. In one application filed under Order 22 Rule 4 CPC the appellant stated that after the death of Smt. Ramkhushi, one Smt. Sajnoo Devi wife of Shyam Sharma was interfering with the possession of the appellant of the disputed property and, therefore, she may be allowed to intervene in the matter. Smt. Sajnoo Devi represented by Mr. G.K. Garg, Advocate, however stated in an application for seeking directions filed on 31.7.1991, in para 4, that the said Smt. Sajnoo had no concern with the subject-matter of the present appeal. However, she

further stated that the said Smt. Ramkhushi had already sold the house to Shri Ghanshyam Murari and Saroj Sharma and that now Shri Prabhu is taking care of the property in question. She further stated that Smt. Ramkhushi had already died before filing of the present appeal and, therefore, a prayer was made in the said application to delete the name of Smt. Sajnoo Devi from the array of cause title. In reply to the said application filed on behalf of the appellant, the appellant stated that sale if any made by Smt. Ramkhushi to Ghanshyam Murari is of no consequence and would be hit by the principles of *lis pendense* and that alleged care taker of the property Prabhu is said to be son-in-law of Smt. Sajnoo Devi who according to appellant was a lady of easy virtues and with a gang of persons was trying to grab the property of various persons including the property belonging to the present appellant who was the only adoptive son of Shri Rajaram. It was further stated in the said reply that since the relationship of Smt. Ramkhushi and appellant Vijay Kumar were not happy and the litigation was going on, the appellant had no knowledge of the exact date and month of death of Smt. Ramkhushi and upon coming to know of her death, the name of Smt. Ramkhushi was sought to be deleted from the array of defendants and in her place the name of Smt. Sajnoo Devi was sought to be added as she was interfering with the possession of the property but now claimed to be having no concern with the said

property in question. It may be stated here that no application along with copies of alleged sale deeds showing the sale in favour of Ghanshyam Murari and Saroj Sharma has been filed before this Court and, therefore, no cognizance of such alleged sale in their favour can be taken by this Court.

6. Be that as it may, since Smt. Sajnoo Devi herself stated before this Court that she has no concern with the property in question, her intervention in the present litigation is also of no consequence and she appears to be nobody interested in either adoption of the appellant or the property consequently devolving upon the present appellant, therefore, her name also deserves to be deleted from the array of defendants as claimed by herself. The resultant position as far as defendants of this civil suit filed by appellant Vijay Kumar is concerned is that both his adoptive father Rajaram having died earlier than adoptive mother Smt. Ramkhushi and the adoptive mother Smt. Ramkhushi has also died, there was nobody to contest the civil suit filed by the appellant Vijay Kumar Sharma. Ramesh Chand Bansal, advocate who was earlier appointed as court guardian for the appellant Vijay Kumar when he was minor in earlier Suit No.29/76 cannot be said to be a contesting defendant and, therefore, allegations made against him that he did not properly represent the interest of appellant who was

minor at that point of time is hardly of any consequence in the present suit.

7. Therefore, the decision of the learned trial court in the present suit dismissing the suit of the appellant for setting aside the decree dated 29.8.1979 in Civil Suit No.29/76 has to be adjudged on its own merits.

8. The learned trial court in the impugned judgment dated 23.11.1987 has framed the following issues in the suit filed by the appellant Vijay Kumar:=

1. Whether Rajaram adopted plaintiff with the consent of defendant No.1 on 20.1.62 by execution of a registered document and so plaintiff is adopted son?

2. Whether defendant No.1 got a decree granted by District Judge, Bharatpur in Suit No.29/1976 in a fraudulent and collusive manner?

3. Is a document registered on 1.8.74 a will and not adoption deed and if so what is effect on the suit?

4. Whether registered document dated 1.8.74 could be nullified by late Rajaram in his life time and civil court has no right to cancel the same and, therefore, decree passed in Civil Suit No.29/76 is null and void?

5. Whether defendant No.1 was estopped to state in Suit No.29/76 that plaintiff was not his adopted son? and if so what is its effect on the present suit?

6. Whether late Rajaram relinquished his right to property described in para 15 of plaint and plaintiff was its real owner?

7. Whether the suit is liable to be dismissed on the grounds/ additional pleas stated in para 18 & 24 of defendant No.1's written statement?

8. Relief?

9. While deciding issue No.1 as to whether Rajaram had adopted the plaintiff on 20.1.1962 with the consent of defendant No.1 (Smt. Ramkhushi) and had executed a document in this regard and got it registered and whether the plaintiff alone is the adoptive son of defendant Rajaram, the learned trial court relied upon Section 9 of the Hindu Adoptions and Maintenance Act, 1956. The said Section 9 reproduced in the impugned judgment appears to have been taken as it existed prior to its amendment by the Hindu Adoptions and Maintenance (Amendment) Act, 1962 (Act No.45 of 1962) with effect from on 29.11.1962. The amended sub-section (4) of Section 9 of the Act is reproduced hereunder for ready reference:-

> "(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a Court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the Court to any person including the guardian himself."

10. The words "or have abandoned the child" and the words "or where the parentage of the child is not known" are not found in the section relied upon by the learned trial court while deciding the said case on 23.11.1987. Though the reason is not given in the impugned judgment

but it may be that since the adoption in question while deciding this issue No.1 was said to have taken place on 20.1.1962, prior to the said amendment w.e.f. 29.11.1962, such unamended provision was taken into account. However, curiously enough in the judgment and decree dated 29.8.1979 given in the earlier Suit No.29/76 which was sought to be set aside in the present suit the same Section 9(4) relied upon by the learned trial court was the amended provisions as quoted above though it was decided way back on 29.8.1979. The object of the said amendment of adding of aforesaid quoted portion in Section 9(4) of the said Act is as given with the Amending Bill "children are sometimes abandoned by their parents for fear of social approbrium, for reasons of poverty and for other reasons. If these children could be given in adoption, they might grow up in congenial home atmosphere as good citizens. These abandoned children are very often brought up in founding homes or other children's institutions. The manager of such homes or institutions having the care and custody of these children is, for all practical purposes, their guardian and there is no reason why he should not have the power to give the child in adoption with the permission of the Court like the testamentary guardian or the guardian appointed or declared by the Court. It is, therefore, considered that this lacuna in the law should be removed by suitably amending Section 9(4) of the Act so as to

bring a person having the care and custody of the child within the meaning of 'guardian'.”

11. In view of the aforesaid amendment in the law, it cannot be disputed that giving in adoption by the Manager of a Government Orphanage could not be assailed on the ground of lack of capacity of giving in adoptions contained in Section 9. The document Ex.18 dated 20.1.1962 has remained unassailed., unrebutted and holds the field even today. No other document having the sanctity of law ever substituted the said registered adoption deed dated 20.1.1962. The subsequent alleged adoption deed dated 6.7.1974, Ex.Dw.2 although registered does not refer to the earlier adoption deed Ex.18 dated 20.1.1962, therefore, setting aside or cancellation of the same even by the decree of the court as done in the present case does not wipe out or automatically cancel the earlier adoption deed dated 20.1.1962. Therefore, even assuming for argument sake while not upholding the same, it is assumed that the decree dated 29.8.1979 cancelling the adoption deed dated 6.7.1974 registered on 1.8.1974 could hold the field, the same does not, in the opinion of this Court, affect the validity and existence of the adoption deed dated 20.1.1962, Ex.18.

12. Mr. G.K. Garg, learned counsel appearing for Smt. Sajnoo Devi though having very candidly submitted that

since Smt. Sajnoo Devi had no concern with either the adoption in question or property in question only submitted that since it was brought to the notice of the Court through the said Smt. Sajnoo Devi that the property in question had been sold to third party such third party should be impleaded as legal representatives of Smt. Ramkhushi. This Court is of the opinion that in the absence of any such application from either side, this Court in appellate stage need not suo motu take cognizance of any such transfer of property and direct the appellant to bring on record such alleged purchaser of property on record. Learned counsel also pointed out an existence of a not proved document, a will executed by Rajaram in favour of his wife Smt. Ramkhushi in which he is said to have stated that he has no other heir or issue and his property should go to his wife but in the absence of such document having been proved before the Court and marked as exhibit, the same cannot be referred and no cognizance of any such document can be taken.

13. The net result of the above discussion is that the learned trial court while deciding issue No.1 in the judgment under appeal has erred in holding that Ex.18 was not proved to be a valid adoption deed. The learned trial court also appears to have erred in not drawing the presumption in accordance with Section 16 of the Act which clearly says that whenever any document registered

under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the persons giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of the Act unless and until it is disproved. In the present case no evidence came on record to disprove the said adoption deed dated 20.1.1962, Ex.18.

14. The learned trial court has also relied upon the judgment in case of **Lakshman Singh Kothari Vs. Smt. Rup Kanwar** [AIR 1961 SC 1378]) and **Kashi Nath Rai Vs. Mahadeo Rai & others** [AIR 1977 Patna 199]. It would be relevant to extract a portion from the head note of the judgment in case of Lakshman Singh Vs. Smt. Rup Kanwar (supra) as under:-

> "Under the Hindu Law, whether among the regenerate caste or among Sudras, there cannot be a valid adoption unless the adoptive boy is transferred from one family to another and that can be done only by the ceremony of giving and taking. The object of the corporeal giving and receiving in adoption is to secure due publicity. To achieve this object it is essential to have a formal ceremony. No particular form is prescribed for the ceremony, but the law requires that the natural parent shall hand over the adoptive boy and the adoptive parent shall receive him. The nature of the ceremony may vary depending upon the circumstances of each case. But a ceremony there shall be, and giving and taking shall be part of it. The exigencies of the situation arising out

> of diverse circumstances necessitated the introduction of the doctrine of delegation; and, therefore, the parents, after exercising their volition to give and take the boy in adoption, may both or either of them delegate the physical act of handing over the boy or receiving him, as the case may be, to a third party."

To the similar effect is the judgment of Patna High Court. The learned trial court has obviously misapplied these judgments to the facts of the present case where not only it has come in evidence that the said plaintiff Vijay Kumar was taken in adoption from a Government Orphanage of Kota on 20.1.1962 and properly executed adoption deed was registered with the Sub-Registrar but the formalities of actual and physical giving the corporal body of boy in adoption was also performed at Bharatpur and the learned trial court itself noticed that Rajaram had handed over the said young boy in the 'Gaud (lap)' of his wife Smt. Ramkhushi. It would be relevant to refer here the statement of Pw.2 Brij Behari who has clearly stated in his statement before the court that the ceremonies of adoption were performed at Bharatpur in his presence and Pandit Shyam Saran Shashtri had also conducted some Pooja and read the religious 'Katha' and coconut fruit and food was served to various guests. Defendant Smt. Ramkhushi set on a 'chowki' and the son Vijay Kumar was given in her 'gaud (lap)' and she also gave a breast feeding to him and there were about 50

men and women assembled there at that time. This clearly shows that whatever envisaged in the registered adoption deed dated 20.1.1962 was fortified and corroborated by subsequent act of physical customary rites of adoption also. In view of this there is no manner of doubt that the plaintiff appellant Vijay Kumar is the adoptive son of Rajaram and Smt. Ramkhushi and after their death the property belonging to Rajaram would naturally devolve upon him being the only surviving son of the deceased Rajaram.

15. Consequently, the present appeal deserves to be allowed and the same is accordingly allowed. The judgment under appeal is set aside and issue No.1 is decided in favour of the plaintiff appellant Vijay Kumar. The other issues are not required to be decided in the present appeal separately and the findings of the learned trial court on other issues would abide by the aforesaid decision on issue No.1. The appeal is accordingly allowed. No order as to costs.

(Dr.VINEET KOTHARI),J.

VS/